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Legislating Freedom from the Bench

The case for legalizing gay marriage by "judicial decree"

[Terry Michael](#) | October 28, 2008

As a 61-year-old, un-partnered, gay, atheist libertarian, I react with mixed emotion but some agreement to arguments against activist judges imposing same-sex marriage.

Such a case was published recently by one of the most persuasive libertarian-minded essayists in daily print journalism, *Chicago Tribune* columnist Steve Chapman. "Massachusetts, California and (just this month) Connecticut have all legalized gay marriage the wrong way—by impatient, unpersuasive judicial decrees," Chapman wrote. "Now California voters have the chance to do it the right way—by the free consent of the governed."

Part of that makes sense. With fewer divisions than the Pope, courts can ill-afford to jump too far ahead of the culture. To do so invites rebellion by activists, like those in California who initiated Proposition 8, which was placed on the ballot this November in an effort to nullify the state supreme court's May decision allowing same sex couples to wed.

I would remind Steve Chapman of something written about a hundred years ago by his fellow Chicago newspaperman, [Finley Peter Dunne](#), as voiced by his famous fictional Irish pub character Mr. Dooley: "The Supreme Court follows the election returns." Certain they can read the minds of the Founders by perusing the Constitution's text with their conservative imaginations, even rabid originalists like Antonin Scalia might acknowledge *that* truth (though it might take a few drinks at Mr. Dooley's tavern for Scalia to come around).

Mr. Dooley made enduring good sense, because justices, one way or another, are products of elections. Many state justices have been directly elected. And those in Massachusetts and Connecticut, though theoretically shielded from the whims of the masses by appointment, are usually politicians named by other politicians, and confirmed by still other elected officials.

So it strikes me as curious that Chapman argues that appointed judges aren't following the "the free consent of the governed."

Pollsters have found significant percentages of voters in the left and right coast states backing gay marriage. A Survey USA poll released just two weeks before Proposition 8 will be decided showed support and opposition running within the margin of error (48 percent for, 45 percent against, and 7 percent undecided).

In fact, a third or more of adults nationwide now tell researchers they back same-sex marriage. But there is a real regional difference, with support at 51 percent in both the West and East, but only 35 percent in the Midwest and 30 percent in the South, according to a Gallup poll taken just a week after the California court ruled on May 5. Even more interesting, however, is how far the culture has moved just since the mid-1980's, when over 80 percent of Americans opposed gay unions. By the mid-1990's, that number had dropped to about 65 percent. And now, according to the Gallup poll from this year cited above, opposition has declined another 10 points.

Contrast where the culture has moved in just a few years on gay marriage with public attitudes towards school desegregation in 1954, when, with *Brown v. Board of Education*, the Supreme Court completely reversed its *Plessy v. Ferguson* ruling of 1896. *Plessy* sanctioned segregation by claiming separate facilities for blacks were not a violation of the equal protection clause of the 14th Amendment.

Shortly after the 1954 Court "decreed" an end to segregation, a May 1954 Gallop poll showed that only a bare majority—55%—of Americans nationwide approved of the decision, and 40% opposed it—very close to the current division on gay marriage. You don't need a pollster to calculate the tiny percentage of voters in Southern states who would have tolerated integration then.

Should the Court have waited for Southern voters to fall in line before overturning *Plessy*? And, 54 years later, should state courts wait for electoral majorities to extend gay men and women the fundamental contractual right of marriage enjoyed by heterosexuals? Opponents of gay marriage, like 19th century proponents of segregation, essentially are claiming the right to protect their cultural and religious beliefs by enshrining them in law. Both Republicans catering to a socially conservative base, and "liberal" Democrats appeasing a divided center, now argue that gays and lesbians can enjoy the same rights afforded to straight couples through contract law, while reserving the term "marriage" for heterosexuals. But they're being disingenuous. To be consistent, they'd support civil unions for straights, who could then take their state-issued licenses to priests, rabbis, and pastors and be blessed as "married."

Where you stand on gay marriage is surely influenced by where you sit in the gay-straight divide. Steve Chapman, who usually does a great job of upholding the most important original intent of our Founders—liberty—doesn't seem to get the urgency of those who are tired of sitting at the back of this particular bus. Even as he gives lip service to what he calls "a noble goal designed to serve both individual freedom and social health," he argues that "a wholesome end doesn't justify every possible means."

A few years ago, I would have been more sympathetic to the "wait-for-the-voters" approach. Never a fan of marital bliss, I find myself empathizing with Texas humorist and heterosexual Kinky Friedman's backhanded support for gay marriage: "Because (gays) have a right to be just as miserable as the rest of us."

But as a libertarian, I have no problem with any court actively "legislating" a fundamental extension of freedom of choice and equal protection of the law. The time to wait for voters has passed. The time to decree this liberty is now.

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